No. 71.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE EAST OHIO GAS COMPANY.

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OPINIONS BELOW.

The opinion of the Petitioner the Federal Power Commission (R. 170-180) is reported at 74 PUR (NS) 256 (1947). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 197-206) is reported at 173 F. 2d 429 (1949).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 14, 1949 (R. 206). The petition for a writ of certiorari was filed on May 13, 1949, and was granted on June 20, 1949 (R. 210), 337 U. S. 937. The jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act and under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

The principal question is too narrowly stated in the FPC[1] brief.

For reasons of safety and economy the great interstate natural gas pipe lines avoid thickly populated communities. Many purely local distributing companies therefore find it necessary to construct and operate high pressure transmission lines of greater or less length to connect their plants with these interstate pipe lines.

The primary question here is whether a company, like East Ohio, whose sole business is local distribution under local franchises, which transports no interstate gas for others nor for resale nor for any purpose other than to meet its local franchise obligations, is subject to federal regulation by the FPC as a "natural-gas company" under the Natural Gas Act solely because as a matter of necessary mechanics it continues for a greater or less distance an interstate movement of gas in its lines.

Other questions—on which the Court of Appeals did not pass—are whether, assuming East Ohio to be subject to FPC jurisdiction as a "natural-gas company," the FPC's orders in this case are arbitrary, unreasonable and invalid under the Natural Gas Act and the Constitution.

STATUTE INVOLVED.

The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, and as amended by Act of February 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. § 717, *et seq.*) are printed in the Appendix to this brief. A pamphlet copy of the Ohio laws administered by the Ohio Commission will be supplied to the Court before argument.

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[1] We use "FPC" for the Federal Power Commission and "Ohio Commission" for The Public Utilities Commission of Ohio in view of the numerous references to each herein.

STATEMENT.

Because of serious omissions in the FPC's brief as to the nature of East Ohio's business and the extent of regulation in Ohio and its grossly exaggerated emphasis on East Ohio's connecting lines, we restate the material facts.

A. East Ohio Is Solely a Local Ohio Natural Gas Distributing Company.

East Ohio is an Ohio corporation whose sole business from the beginning has been and now is the direct local distribution of natural gas in Ohio (Item 11, Ex. A, Tr. Vol. I, pp. 81-82, Tr. Vol. VII, p. 2513; Tr. Vol. I, pp. 74, 86, 92, 108-A, 116, 133; R. 25). It serves more than 551,000 consumers in 69 northeastern Ohio municipalities, having an estimated population of more than 2,000,000 people, of which the principal are Cleveland, Akron, Canton, Massillon and Youngstown (R. 89; Ex. 3, Tr. Vol. I, p. 95, Tr. Vol. IV, p. 1967).

The total sales of East Ohio in 1945 were 77,428 million cubic feet (R. 89). All but Ohio field sales were sales at retail to domestic and industrial consumers through East Ohio's lines in the 69 Ohio communities served.[2] No sales to industrial or other consumers from pipe lines outside of those communities are made. No sales of any kind are made to any other company for resale (R. 16-17, Tr. Vol. I, p. 116).

In each of the incorporated communities served by East Ohio it has a local franchise for distribution (Tr. Vol. I, pp. 74-75, 117; Item 11, Ex. C, Tr. Vol. I, p. 82, Tr. Vol. VII, p. 2513). The rates for that service, both do-

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[2] East Ohio's field sales of 627 million cubic feet in 1945 (the last full year in the record) are sales made either from the well mouth or from gathering lines to drillers, lessors and others. Field sales in their entirety are made from the Ohio producing fields and the gas is consumed entirely in Ohio (R. 16-17, Tr. Vol. I, p. 116).

mestic and industrial, as well as all the terms and conditions of that service, are fixed in each instance either by an ordinance passed by the municipal council and accepted by East Ohio, as provided in Ohio G. C. Secs. 3982 and 3983, or by order of the Ohio Commission, either under a proceeding initiated by East Ohio under Ohio G. C. Secs. 614-20 *et seq.* or by an appeal under Ohio G. C. Secs. 614-44 *et seq.* from a municipal ordinance fixing an unacceptable rate or unacceptable service terms. Regardless of how the rate is fixed a schedule covering domestic and industrial service is filed with the Ohio Commission. Ex. 6 (Tr. Vol. I, p. 122, Tr. Vol. IV, p. 1983) is a copy of all rate schedules on file with the Ohio Commission under which all gas in 1945, except field sales, was sold to domestic and industrial consumers (Tr. Vol. I, pp. 115-120).

East Ohio has never transported and does not now transport natural gas in interstate commerce, or otherwise, for any other person, nor has it ever held itself out as being willing to undertake this service (R. 23).

East Ohio for many years has purchased gas from Hope Natural Gas Company, an interstate wholesaling company, now a "natural-gas company" subject to FPC jurisdiction (FPC Brief, p. 40), with which this Court is familiar. These purchases in 1945 were about 62% of East Ohio's supply (R. 89). The Hope gas is delivered to East Ohio principally at two points on the Ohio side of the Ohio River (Ex. 5, Tr. Vol. I, p. 113, Tr. Vol. IV, p. 1981; R. 17-19, 32-33). The price at which all Hope gas is sold to East Ohio was fixed in a recent rate proceeding by the FPC and is set forth in schedules filed pursuant to orders of the FPC (R. 21-22; Item 11, Tr. Vol. I, p. 82, Vol. VIII, p. 2829).

In 1945 about 23% of East Ohio's supply was purchased by it from Panhandle Eastern Pipe Line Company (R. 89), another interstate wholesaling "natural-gas company" with which this Court is also familiar. This gas is

delivered by Panhandle to East Ohio at Maumee, Ohio, where the lines of the two companies connect (Ex. 5, Tr. Vol. I, p. 113, Tr. Vol. IV, p. 1981). This gas, first purchased in 1944, is likewise sold to East Ohio under a rate fixed by order of the FPC in a rate proceeding before it and is set forth in schedules filed pursuant to FPC orders (R. 21-22, Item 14, Tr. Vol. I, p. 82, Tr. Vol. VIII, p. 2898).

The remaining 15% of its 1945 supply East Ohio procured in the Ohio fields either by production or by purchase from other Ohio producers at or near the well mouth (R. 89). No gas has ever moved from East Ohio's pipe lines to points out-of-state (R. 19-20).

Connecting its various sources of supply with its 551,000 consumers East Ohio has the usual pipe lines of varying sizes and operating under various pressures, valve stations, regulator stations, compressing stations and other equipment, and an extensive underground storage area where both out-of-state and Ohio gas is stored during periods of slight demand for use in periods of large demand (R. 91, 17-23, 27-28, 55, 58-59).

The center of East Ohio's system for controlling gas supplies is its Gross Farm Station located just north of Canton, Ohio (R. 23, 58-59; Ex. 4 (Map), Tr. Vol. I. p. 108 A, R. 91). At this station the gas can be so controlled by valves and regulators and compressors as to flow to any part of the system where it is needed. This is true of the out-of-state gas as well as the Ohio gas (R. 23, 58-59). Generally speaking, the out-of-state gas, received at working pressures up to 320 pounds, does not require additional pumping to deliver it to East Ohio's consumers although a compressor station exists near Gross Farm for the purpose of supplying additional pressure when needed (R. 36-37).

The total number of miles of pipe line owned and operated by East Ohio as of December 31, 1945, was as follows, using the accounting classification required by the Ohio Commission (R. 88):

	Miles
Distribution lines	5,490
Storage lines	672
Field lines	1,011
Transmission lines	903
Total	8,076

Of the 903 miles of pipe classified accounting-wise as transmission lines, five multiple lines averaging a little over 100 miles in length carry gas purchased from Hope on the northern bank of the Ohio River to Gross Farm Station or to city plants. Another line, slightly longer, brings the gas purchased from Panhandle at Maumee, Ohio, to Gross Farm Station (Ex. 4 (Map), Tr. Vol. I, p. 108 A, R. 91).

All of East Ohio's property, regardless of its accounting classification, is used solely and exclusively to satisfy its local utility obligations (R. 25-28). If East Ohio's distribution business were terminated it would have no use whatever for any of its property (R. 25). Its property, its gas purchases and sales, its gas receipts and deliveries are all in Ohio (R. 13, 25).

These facts were correctly summarized by the court below when it found (R. 202):

> "* * * Not only does East Ohio produce or gather natural gas, but it strongly urges, and we believe the previously discussed facts clearly demonstrate, that it is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high-pressure lines, is devoted to that sole purpose." (Italics by court below.)

B. East Ohio Has Always Been Fully Regulated by Ohio Regulatory Authorities.

East Ohio is now, and since long before the passage of the Natural Gas Act has been, subject to complete regulation by the State of Ohio and its various agencies. These include in particular the various Ohio municipalities which East Ohio serves and the Ohio Commission.

Part of the State power over gas utilities is vested by the Ohio Constitution and statutes in Ohio municipalities under the "home rule" doctrine (The Constitution of the State of Ohio, Article XVIII, Sections 1, 3, 4, 5, 7; Ohio G. C. Secs. 3982, 3983 and others). Under this authority the Ohio cities grant franchises and make contracts with East Ohio for natural gas service, the rates therefor, or both (*supra*, pp. 3-4).

Since 1911 (102 Laws of Ohio 549 *et seq.*) the Ohio Commission has been vested by the State of Ohio with supervisory powers over the foregoing Ohio municipal authorities and with full regulatory powers over East Ohio. The Ohio Public Utilities Act defines as a public utility subject to its jurisdiction a company "engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state" (Ohio G. C. Secs. 614-2, -2a). "The jurisdiction, supervision, powers and duties of" the Commission are declared to extend to every public utility "the plant or property of which lies wholly within this state," to companies operating the same, and to the records and accounts of the business thereof done within this state (Ohio G. C. Sec. 614-4). The Commission is given power of general supervision (Ohio G. C. Sec. 614-8), to examine records (Ohio G. C. Sec. 614-7), to establish a system of accounts (Ohio G. C. Sec. 614-10), to require adequate service and facilities (Ohio G. C. Sec. 614-13), to prohibit rebates and discrimination (Ohio G. C. Secs. 614-14, -15), to determine rates other than those fixed by contracts with municipalities (Ohio G. C. Secs. 614-20 *et seq.*), to hear appeals from and set aside municipal ordinance rates and service provisions which have not been agreed upon and to fix substitute rates and service provisions (Ohio G. C. Secs. 614-44 *et seq.*), to require annual reports (Ohio G. C. Secs. 614-48), to fix proper depreciation charges and order a depreciation fund to be established (Ohio G. C. Secs. 614-49, -50), to control the issuance of

securities (Ohio G. C. Sec. 614-53), to control the purchase or sale of other utility property (Ohio G. C. Sec. 614-60), and numerous other regulatory powers customarily found in Public Utility Acts.

These other usual regulatory powers include authority over the abandonment of East Ohio's main pipe lines and gas lines (Ohio G. C. Secs. 504-2 and 504-3). This authority has been invoked, for example, to prevent East Ohio from terminating service (*Cleveland v. The East Ohio Gas Co.*, 34 Ohio App. 97, 170 N. E. 586 (1929), petition in error dismissed because no debatable constitutional question, 121 Ohio St. 628, 172 N. E. 379 (1930)).

Under the authority of these statutes East Ohio has been required to conform to the Ohio Commission's uniform system of accounts, to employ depreciation rates fixed by the Ohio Commission, to file annual reports on Ohio Commission forms, to submit to investigation and examination on various matters and the like (Tr. Vol. I, pp. 130-131). All of its properties, including its high pressure connecting lines of which the FPC makes such a point, have of course been subjected to examination, appraisal and review as to condition and utility in rate cases[3] (R. 24-25). The record shows in Exhibit 7 (Tr. Vol. I, p. 128, Tr. Vol. V, p. 2130) a list of merely the formal regulatory proceedings before the Ohio Commission involving East Ohio. They total as follows (Tr. Vol. I, pp. 128-130):

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[3] *The East Ohio Gas Company v. City of Cleveland*, 4 PUR (NS) 433 (1934); *Re East Ohio Gas Company*, 17 PUR (NS) 433 (1937); *The East Ohio Gas Company v. The Public Utilities Commission of Ohio, etc.*, 133 Ohio St. 212; 12 N. E. 2d 765 (1938); *East Ohio Gas Company v. City of Cleveland*, 27 PUR (NS) 387 (1939); *The East Ohio Gas Company v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases)*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940); *The East Ohio Gas Company v. City of Cleveland*, 56 PUR (NS) 73 (1944).

Ohio Commission Proceedings	*No.*
Involving rates	160
Involving acquisition or sale of property	77
Relating to issuance of securities	11
Relating to accounting practice	4
Relating to termination or beginning of service	3
General complaints as to service, etc.	3
Total	258

It has very recently been determined by the Supreme Court of Ohio that irrespective of municipal contracts the Ohio Commission may in the interest of the Ohio public determine who shall and who shall not receive gas service from the lines of East Ohio during periods of gas shortages. *City of Akron v. Public Utilities Commission of Ohio*, 149 Ohio St. 347, 78 N. E. 2d 890 (1948); Cf. *Newman v. The East Ohio Gas Co.*, 149 Ohio St. 360, 78 N. E. 2d 897 (1948).

Thus East Ohio has no activities of any kind not under supervision and regulation by the State of Ohio and no public utility service or property not regulated in Ohio, and the court below so specifically found (R. 200):

> "There can be little doubt that petitioner is now and has been very thoroughly and completely regulated by the Ohio Commission."

C. History of the Proceedings before the Federal Power Commission and the Court Below.

In order that the Court may understand some references in the FPC's Opinions Nos. 37 (1 F. P. C. 586) and 158 (R. 170), and some later references in this brief, a chronological history of the East Ohio jurisdictional issue before the FPC is necessary.

Promptly after the passage of the Natural Gas Act in 1938 the City of Cleveland, then engaged in a rate controversy with East Ohio before the Ohio Commission, filed an application with the FPC requesting it to investigate the cost to East Ohio of transporting natural gas through

its lines from the Ohio River to Cleve' d (Tr. Vol. X, p. 3318).[4] This proceeding was dc d as FPC Docket No. G-115. The FPC, completely *ex parte*, found East Ohio to be a "natural-gas company" under the Act and issued an order directing East Ohio to prepare and submit to it voluminous detailed data in connection with its pipe line property and operations (R. 100).

After applications to the FPC for a hearing and for a rehearing and stay, all of which were denied (Tr. Vol. X, pp. 3328, 3502, 3503, 3506), East Ohio filed a petition for review in the United States Circuit Court of Appeals for the Sixth Circuit, claiming that the FPC was without jurisdiction, that the order directed to it would entail very great and obviously useless expense and that the mere finding by the FPC that it was a "natural-gas company" would require it to comply with the general FPC accounting and other orders. The FPC moved to dismiss on the ground that the findings and the order made were not reviewable. Its position was that this order could be reviewed only if an enforcement proceeding by the FPC in the United States District Court were instituted pursuant to Section 20 of the Natural Gas Act. The Circuit Court of Appeals sustained the FPC's motion to dismiss. *East Ohio Gas Company v. Federal Power Commission*, 115 F. 2d 385 (C. C. A. 6th 1940).

Thereafter, to this date, no proceeding has been brought by the FPC in any court to enforce any of its orders against East Ohio.

In the meantime East Ohio has not complied with any general FPC orders as to accounting, annual reports or

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[4] The Ohio Commission and the Supreme Court of Ohio fully disposed of this rate litigation, including the cost of gas delivered to Cleveland, without FPC help in 1939 and 1940. *Re East Ohio Gas Company v. City of Cleveland*, 27 PUR (NS) 387 (1939); *The East Ohio Gas Co. v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission of Ohio (Two Cases)*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940).

otherwise. It did, however, after the amendment of Section 7 of the Natural Gas Act on February 7, 1942, which instituted a system of requiring certificates of convenience and necessity from the FPC (56 Stat. 83, 15 U. S. C. Sec. 717f, pars. (c)-(g)), on three occasions file application for such certificates. The first was for a so-called "grandfather clause" certificate covering its existing operations (FPC Docket No. G-266; Item 11, Tr. Vol. I, p. 82, Tr. Vol. VII, p. 2513) and the others for additional pipe lines in Ohio, one to connect with Panhandle at Maumee, Ohio (FPC Docket No. G-458; Item 15, Tr. Vol. I, p. 82, Tr. Vol. VIII, p. 2929) and the other to add a further line to connect with Hope at the Ohio River (FPC Docket No. G-695; Item 19, Tr. Vol. I, p. 82, Tr. Vol. IX, p. 3261). In all of these cases East Ohio, because its status had not been determined by the courts, adopted the prudent course of applying to the FPC, setting forth the facts as to its operations and asking the FPC in the alternative to find (a) that East Ohio was not a "natural-gas company" under the Act and need not obtain a certificate from the FPC or, (b) if the FPC still adhered to the view that East Ohio was a "natural-gas company," to grant the certificates.[5] In each of these cases the FPC found East Ohio to be a "natural-gas company" and in each case granted the certificate sought.[6] Since East Ohio was not prejudiced by any of these orders of the FPC it could not obtain a review by the courts of the finding that it was a "natural-gas company" and it was so advised by its counsel (R. 28-29).

The proceedings in Docket No. G-115 long lay dormant before the FPC after the decision of the Sixth Circuit Court of Appeals in 1940, although in 1942 during the pendency

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[5] The FPC brief erroneously reverses the order of these requests, see fn. 2, pp. 4-5.

[6] *Re The East Ohio Gas Co.*, 4 F. P. C. 15 (1943); *Re The East Ohio Gas Co.*, 4 F. P. C. 497 (1944); *Re The East Ohio Gas Co.*, Docket No. G-695 (1946), R. 170, fn. 1.

of another rate proceeding before the Ohio Commission the Cities of Euclid, Cleveland and Lakewood filed so-called complaints which asked the FPC to find East Ohio a "natural-gas company" and to enforce its general accounting orders against it (Docket No. G-399, R. 109; Docket No. G-400, R. 114; Docket No. G-401, R. 119) and East Ohio promptly filed motions to dismiss these complaints (R. 125, 126, 128). At last in February, 1946, the FPC revived Docket No. G-115 by denying these motions to dismiss, consolidating these proceedings with it and ordering East Ohio to show cause why it should not comply with the 1939 FPC order in Docket No. G-115 applying specifically to East Ohio and all the FPC's general accounting and report orders (R. 129-136).

Following hearings in March, 1946, the FPC issued an order dated June 25, 1946 (R. 140-151), which again found East Ohio to be a "natural-gas company" subject to FPC jurisdiction and among other matters (1) ordered East Ohio to comply with all previous general FPC accounting orders applicable to all "natural-gas companies" subject to FPC jurisdiction;[7] (2) ordered East Ohio to comply with all previous FPC orders requiring the filing of annual reports by such "natural-gas companies";[8] and (3) ordered East Ohio within 90 days to file with the FPC the data, statements and reports required by its 1939 order in so far as it reasonably could and to inform the FPC when the remainder would be filed.

Applications for a rehearing and stay of this June 25, 1946 order were filed (R. 151, 163) and granted (R. 169). After further arguments before the FPC it issued its

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[7] No. 69: Ex. 1, Item 5, Tr. Vol. I, pp. 81-82, R. 71; No. 69-A: Ex. 1, Item 21, R. 83; and No. 73: Ex. 1, Item 8, R. 74.

[8] No. 63: Ex. 1, Item 1, Tr. Vol. I, pp. 81-82, R. 69; No. 80: Ex. 1, Item 11, R. 80; No. 86: Ex. 1, Item 16, R. 81; No. 100: Ex. 2, Item 1, Tr. Vol. I, pp. 81-82, R. 85; and No. 113: Ex. 2, Item 2, R. 87.

Opinion No. 158 on November 6, 1947 (R. 170-180), which included an order reaffirming its June 25, 1946, order. After further applications for a rehearing and stay (R. 180, 188) the FPC issued an order dated December 30, 1947 (R. 195) modifying its prior orders in respects not now material and otherwise denying the applications.

In both the review before the United States Circuit Court of Appeals for the Sixth Circuit and the revived Docket No. G-115 proceedings the State of Ohio and Ohio Commission intervened and became parties in opposition to the FPC's assertion of jurisdiction over East Ohio (R. 138, 139, 163, 188).

East Ohio, with the State of Ohio and the Ohio Commission intervening as petitioners, duly petitioned the United States Court of Appeals for the District of Columbia Circuit for review of these FPC orders as authorized by Section 19(b) of the Natural Gas Act (R. 1-11). That court (through Clark, *J.*, with Edgerton, *J.*, dissenting) reversed the FPC orders "in so far as they purport to pertain to East Ohio" (Opinions, R. 197-206; Judgment and Decree, R. 206). It held East Ohio was not subject to FPC jurisdiction under the Natural Gas Act and therefore found it unnecessary to pass on the other questions argued before it (R. 205).

D. The Exorbitantly Expensive and Useless Burden Sought to be Imposed on East Ohio and Ohio Gas Consumers by the Federal Power Commission.

The FPC orders so reversed by the court below on the issue of FPC jurisdiction required East Ohio to file annual financial and statistical reports in the form prescribed by the FPC covering *all* of East Ohio's properties and operations for 1939 and subsequent years and to conform *all* of its accounting for *all* of its properties and operations with the FPC system of accounts and the particular "original cost" determination instructions thereunder.

During each of the years since the passage of the Natural Gas Act, and before, East Ohio has been keeping its books of accounts in accordance with the uniform system of accounts prescribed or permitted by the Ohio Commission to be used, and has filed annual reports, depreciation rates and similar accounting and other data with the Ohio Commission (Tr. Vol. I, pp. 71, 130). The uncontradicted evidence shows that the cost to East Ohio of attempting to comply with FPC Orders Nos. 69, 69-A and 73 requiring reclassification and a statement of "original cost" of *all* of East Ohio's properties—general, distribution, transmission and production,—would now be between $1,500,000 and $2,000,000 (R. 25).[9]

It is important to note that admittedly East Ohio has no rates subject to FPC regulation (FPC Brief, p. 42).

It is also an important fact that under Ohio statutes the original cost of utility property, particularly as defined by the FPC in its Order No. 73 (R. 74), is not a recognized element in rate making by Ohio rate regulatory authorities. *The East Ohio Gas Co. v. Public Utilities Commission of Ohio,* 133 Ohio St. 212, 12 N. E. 2d 765 (1938); *The East Ohio Gas Co. v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases),* 137 Ohio St. 225, 28 N. E. 2d 599 (1940); *City of Marietta v. Public Utilities Commission of Ohio,* 148 Ohio St. 173, 74 N. E. 2d 74 (1947).

At the various hearings before the FPC during the 10 year history of this matter there was never any evidence of any kind introduced by the FPC at any time that com-

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[9] This total cost was the direct testimony of East Ohio's President (R. 25), and despite extensive cross-examination on every other point by the FPC staff he was not asked one question on this estimate. Nor did the FPC put on a staff witness, subject to cross-examination, to testify on the basis of the FPC's "experience with other companies with greater property investment" that "this estimate is considerably exaggerated" (FPC Brief, p. 79; R. 179). The truth is this $1,500,000 to $2,000,000 cost never was a disputed fact.

pliance by East Ohio with the FPC's orders at the enormous expense involved would serve any useful purpose whatsoever—nationally or locally—or that failure to furnish it would do or had done any one any harm whatsoever.

Thus the FPC has sought in these proceedings to require East Ohio to spend between $1,500,000 and $2,000,000 for no reasonable or rational purpose. The only conceivable object is to keep the FPC expensively informed as to each detail of each of East Ohio's properties and operations, past and present—all of which were and are in Ohio, none of which involve rates or service subject to FPC jurisdiction and as to all of which East Ohio is already obligated to and does keep the Ohio Commission informed.

All this great additional expense for no useful purpose must in the end be borne as a part of the cost of natural gas from East Ohio by its customers in Ohio, as the evidence showed (R. 60). For these and other substantial reasons the State of Ohio and the Ohio Commission have from the beginning of the FPC assertion of jurisdiction over East Ohio been strongly opposed to that claim of power. We call particular attention to the statement of the Assistant Attorney General of Ohio at R. 61-63.

SUMMARY OF ARGUMENT.

I.

A. (1) The occasion for the passage of the Natural Gas Act was the impotence of the States to regulate the wholesale rates charged by interstate pipe line companies for gas sold for resale. The Act was not intended to cut down State power over interstate commerce but rather by filling this gap in regulation to make State power more effective. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507 (1947). Thus Congress intended the States to retain all the power they formerly had over interstate commerce.

(2) Long prior to the Natural Gas Act it was settled by this Court that the States could regulate interstate commerce in the absence of federal regulation where local interests were vital and any national interest slight. The *Cooley* formula is of course applicable to the natural gas industry. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra.*

Under the *Cooley* formula the State of Ohio had and has full power to regulate all of East Ohio's properties and operations. In transmitting solely its own gas from points of regulation by the FPC to its Ohio distribution areas, without making sales at wholesale to distributing companies, East Ohio moves gas in interstate commerce solely as incident to the business of local distribution in Ohio. The interests of the people in Ohio in all of those operations are vital and dominant. Any supposed national interest is illusory. There is here a "wide scope for local regulation without impairing the uniformity of control over the national commerce in matters of national concern and without materially obstructing the free flow of commerce." *California v. Thompson*, 313 U. S. 109, 113.

(3) There is no support in the legislative history of the Natural Gas Act for the FPC argument that East Ohio

"in particular" was intended by Congress to be subject to FPC jurisdiction. The legislative history actually shows that East Ohio and similar local distributing companies were not intended to be subject to FPC regulation.

B. The jurisdictional provisions of the Natural Gas Act exclude East Ohio.

(1) The Act subjects to FPC jurisdiction only companies engaged in the *business* of transporting or selling natural gas in interstate commerce of such a character as to require uniform federal regulation of such companies as public utilities. The FPC argument that the mere mechanical movement of interstate gas in East Ohio's pipe lines makes it subject to FPC jurisdiction overlooks two important factors.

First. The Act is not an Act to regulate gas or transportation. It is an Act to regulate certain interstate public utility aspects of the natural gas business. The Act itself shows that it is a public utility regulatory Act concerned with rates and service and other matters usual in regulatory Acts.

Second. Natural gas flows in continuous movement from producing wells to consumers' burner tips without regard to State lines or the dominance of national or local interests. Accordingly Congress did not make the test of FPC jurisdiction depend upon the mechanical test of interstate movement. Instead, it adopted the business test and sought to regulate federally only the business of interstate transportation for hire or interstate sales for resale. Any other business remained subject to State regulation.

A local distributing company that purchases interstate gas at a point of FPC regulation and merely carries that gas through its lines solely for the purpose of local distribution is not engaged in the "business of transportation" or even in "transportation" in any interstate public

utility or regulatory sense. It is not within the affirmative grant of power to the FPC.

Such transportation is "merely an incident to the use at the end," which end is local distribution. The *Pipe Line Cases*, 234 U. S. 548, 562 (1914). Such transportation is expressly excluded from FPC jurisdiction by Section 1(b) of the Natural Gas Act as "other transportation."

(2) In any realistic sense the business of East Ohio, and all other distributing companies similarly situated, is solely "local distribution" and the connecting lines between their distribution areas and the interstate pipe lines are in every sense "facilities used for such distribution," both expressly excluded from FPC jurisdiction by Section 1(b) of the Natural Gas Act. Indeed, in *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465 (1931), this Court held that East Ohio's business was of such a local nature that the State of Ohio could impose a direct burden upon that business by levying an excise tax on its *entire* gross receipts. East Ohio's gross receipts then came, as they now come, solely from Ohio consumers and result from the operation of these connecting lines as well as its other local distribution properties as one business. It has no other receipts and no other business. But for its local franchises in various municipalities it would have no use whatever for these connecting lines.

(3) Other provisions of the Natural Gas Act show clearly its inapplicability to East Ohio. East Ohio has neither a rate nor a service that the FPC can regulate. It has no rates for transportation or for sales for resale. It engages in neither of these activities. Moreover, no other provisions of the Natural Gas Act, fairly construed, are applicable to East Ohio.

II.

A. The FPC's orders directed to East Ohio exceed its statutory authority. Section 8 and other Sections of the Natural Gas Act specifically provide that all FPC orders must be "necessary or appropriate in the administration of the act." The extensive data which the FPC has ordered East Ohio to produce in respect of *all* of its properties will cost up to $2,000,000. As the evidence showed it can serve no useful purpose whatsoever—either nationally or locally. It is neither "necessary or appropriate."

B. Under all the facts here involved these FPC orders invade reserved State powers. They are directed to no specific purpose, serve no useful end and thus are forbidden by the Fourth Amendment. The expense of compliance with these orders is so utterly disproportionate to any value of the information to be obtained that they constitute an invalid taking of East Ohio's property under the Fifth Amendment. The FPC's disregard of the evidence on this expense and this lack of utility and its purported reliance on matters not presented in evidence deprive East Ohio of procedural due process under this Amendment.

ARGUMENT.

I. THE NATURAL GAS ACT DOES NOT SUBJECT EAST OHIO TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION.

A. THE NATURAL GAS ACT WAS CAREFULLY DESIGNED TO EXCLUDE ALL LOCAL DISTRIBUTING COMPANIES INCLUDING EAST OHIO EVEN THOUGH SOME MOVEMENT IN INTERSTATE COMMERCE WAS INVOLVED, SINCE THEY WERE EFFECTIVELY REGULATED UNDER THE EXISTING POWER OF THE STATES.

1. It has been settled by this Court that the Natural Gas Act was to assist State power and not to impair or reduce it in the slightest degree.

No detailed discussion of the history and purpose of the Natural Gas Act is necessary in view of the repeated and extensive consideration given to that history by recent decisions of this Court.[10]

Of that Act this Court said in 1947:

> "The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legislative history, including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.

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[10] *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502-503 (1949); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 514-519 (1947); *Public Utilities Commission of Ohio v. United Fuel Company*, 317 U. S. 456, 467 (1943).

"It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption." (*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 517-519 (1947).)

The gap in regulation which brought about the Natural Gas Act was the "impotence of the states to act in relation to sales for resale by interstate carriers." (*Id.*, p. 516.)

Plainly, therefore, if Ohio had the power to regulate the activities of East Ohio prior to the passage of the Natural Gas Act Congress did not intend by that act to reduce such power in any respect.

2. It has been settled by this Court that the States may regulate interstate commerce in the absence of federal regulation where local interests are vital and any national interest is slight as in the case of all East Ohio's operations.

We have previously set forth in detail (*supra*, pp. 6-9) the extent to which East Ohio has been regulated for 35 years by the Ohio Commission.

The court below summarized the undisputed testimony on this point as follows:

"The Ohio Commission was created in 1911. Ever since that date it has repeatedly and continuously exercised its regulatory powers over all the business activities and property of petitioner. This regulation has included the setting of numerous rates, the supervision of acquisitions and sale of property and security issues, the control of accounting practices, inauguration and termination of service, examining service complaints, and requiring the submission of detailed re-

ports to the Ohio Commission. Abundant state statutory authority exists for this regulation by the Ohio Commission and the state regulation authorized is mandatory, not permissive. As of the time of the hearings before the Commission in this case there had been a total of 258 formal regulatory proceedings before the Ohio Commission involving East Ohio. There can be little doubt that petitioner is now and has been very thoroughly and completely regulated by the Ohio Commission." (R. 199.)

Moreover, an examination of the FPC orders with which East Ohio has been directed to comply in this proceeding indicates that every one is an order which the State of Ohio had power to authorize its own Public Utilities Commission to make. The only thing the FPC orders require that the Ohio Commission has not already required is the determination of the "original cost" of East Ohio's properties to the persons first devoting them to public service. No one doubts that Ohio, as have other States, could have authorized its Commission to require that determination and to use it in fixing rates if Ohio had deemed it important.

The FPC brief suggests (pp. 23, 31), though it is apparently unwilling to argue the question directly, that the extensive regulation of East Ohio which the Ohio Commission has conducted for many years is unconstitutional and invalid. The failure to face that question directly is not surprising.

The great gap in regulation which the Natural Gas Act was designed to meet is illustrated by *Missouri v. Kansas Gas Company*, 265 U. S. 298 (1924), and *Public Utility Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). Both of those cases held the States powerless to regulate interstate wholesale rates, in one case of gas and in the other of electricity. There was thus involved the regulation by a single State of matters directly affecting

the consumers of two or more States. When, therefore, this Court held that those particular subject matters were national in character and must be regulated, if at all, by Congress, it was simply applying the long-established *Cooley* formula (*Cooley v. Board of Wardens*, 12 How. 299 (1851)).[11] It thus determined that the national interest in protecting the consumers of several States against action by a single State over-balanced any interest of the State attempting regulation.

This aspect of those cases was explicitly developed in the *Attleboro* case, *supra*. There the Court pointed out the many problems which would arise between the States of Rhode Island and Massachusetts if the Court recognized the power of a State to regulate interstate wholesale rates.[12]

However, where the interests of the people of a single State are concerned there is a "wide scope for local regulation without impairing the uniformity of control over the national commerce in matters of national concern and without materially obstructing the free flow of commerce." *California v. Thompson*, 313 U. S. 109, 113 (1941).

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[11] See also Mr. Chief Justice Marshall's opinion in *Willson v. Black Bird Marsh Co.*, 2 Pet. 245 (1829), and Mr. Chief Justice Taney's opinion in the *License Cases*, 5 How. 504 (1847).

[12] "Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such intersfate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress. * * *" (273 U. S., 90.)

In the recent case of *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra*, this Court said that any supposed national interest in sales by an interstate pipe line company to an industrial consumer was "largely illusory," that the State in which the sales were made had a "vital local interest," and concluded:

> "State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests." (332 U. S., 522-523.)

In the present case the national interest is completely served by FPC regulation of Hope and Panhandle who sell to East Ohio for resale in the State of Ohio. The great gap in regulation with which Congress was primarily concerned in the Natural Gas Act is thus closed. The transmission of the gas purchased by East Ohio thereafter solely for the purpose of local distribution is a matter in which the interests of the State of Ohio and its citizens are vital and dominant. Any interest of the people of other States in that transmission is unimportant and illusory.

Ohio's interest in these lines that furnish the supply for the local distribution plants of East Ohio is just as vital, just as real and just as important in every respect as it is in the pipes laid in city streets. Both are necessary for local service, neither serves any other purpose.

True it is that this State power is not unfettered. It can only require that interstate commerce "be done on terms reasonably related to the necessity for protecting the local interests on which the power rests." (332 U. S., 523.) However, the fact that the power is not wholly unqualified is not a denial of the power or of its effectiveness for all present purposes. In fact it is a recognition of the power

itself. That power is obviously present as to all of East Ohio's properties and operations.

The only specific suggestion made by the FPC on the lack of such power appears in Opinion No. 158 where the FPC said (R. 176-177):

> "* * *, the State of Ohio lacks power to confer upon its Commission authority to require a certificate of public convenience and necessity for a transmission line used solely for transporting out-of-state gas, as, for example, East Ohio's 112-mile line connecting with Panhandle. Any prior doubt as to whether this be so, was resolved when Congress provided in Section 7(c) of the Natural Gas Act for national control of this very matter (*Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, 506, 510; *cf. Colorado-Wyoming Gas Company v. Federal Power Commission*, 324 U. S. 626, 629-631)."

This statement is repeated in footnote 11 on page 23 of the FPC brief here.

The FPC's premise that the State of Ohio lacks complete power over East Ohio is erroneous; the cases cited by it are not in point and Ohio jurisdiction is complete.

In both the cases cited by the FPC out-of-state gas was purchased by a company which then transported it to local distributing companies to which it was resold for local consumption. Obviously both of these companies were wholesaling gas "for resale" and were subject to FPC jurisdiction. These cases neither held nor intimated that the State lacked power to authorize the State Commission to grant or withhold certificates of convenience and necessity from persons transporting gas in interstate commerce within the State for its own retail sales.

While the State of Ohio has never seen fit to require a certificate of public convenience and necessity from the Ohio Commission for the construction of natural gas pipe lines, eighteen other States do require such a certificate

before construction by a gas company may be undertaken.[13] Actually the initial construction of these lines in Ohio is dependent upon the acquisition of Ohio municipal franchises and other local Ohio permissions to use streets and highways. It accords with the Ohio municipal "home rule" doctrine (*supra*, p. 7) to let the practical determination of the building of necessary lines rest with the Ohio municipalities.

However, the State of Ohio does require the consent of the Ohio Commission to the abandonment of any main pipe lines and gas lines (*supra*, p. 8), since in this instance the general State interest may be more important than one local municipal interest.

The State of Ohio also requires an interstate carrier to procure a certificate of convenience and necessity to operate by motor over the State's highways (Ohio G. C. Sec. 614-88). This Court in *Bradley v. Public Utilities Commission of Ohio*, 289 U. S. 92 (1933), affirmed an order of the Ohio Commission denying such a certificate to an interstate motor carrier on the ground that the route specified was already so badly congested by motor traffic that the addition of the applicant's proposed service would cause excessive hazard to the safety of travelers and property upon that highway.

Thus the State of Ohio prior to the Natural Gas Act had full power to regulate every phase of East Ohio's

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[13] 14 Ala. Code § 332 (1940); Ariz. Code Ann. § 69-235 (1939); Col. Stats. Ann. Ch. 137 § 36 (1935); Idaho Code Ann. § 59-526 (1932); Ill. Ann. Stats. Ch. 111⅔ § 56 (Smith-Hurd 1934); Ind. Stats. Ann. § 54-601 (Burns 1933); Kan. Gen. Stats. Ann. § 66-131 (1935); Ky. Rev. Stats. § 278.020 (1946); Mich. Stats. Ann. § 22.142 (1937); Mo. Rev. Stats. Ann. § 5649 (1939); Nev. Comp. Laws § 6137 (1929); N. Y. Consol. Laws, Public Service Law § 68 (McKinney 1939); N. Car. Gen Stats. § 62-101 (1943); N. Dak. Rev. Code § 49-0303 (1943); Ore. Comp. Laws Ann. § 112-4, 131 (1940); 4 Utah Code Ann. § 76-4-24 (1943); Wisc. Stats. § 196.49 (4a) (1943); Wyo. Comp. Stats. § 64-304 (1945).

activities, as it actually did. The comprehensiveness of this power is not to be reduced in the least by reason of the fact that it cannot be exercised arbitrarily nor so as to impose unreasonable burdens on interstate commerce. Questions of limitation arise only after power is exercised.

When, therefore, we approach the construction of the Natural Gas Act it must be with full awareness that Congress not only intended to leave to traditional state regulation all of the power the States then possessed, but intended by that Act to supplement State power and make it more effective.

3. The argument that East Ohio "in particular" was intended by Congress to be subject to FPC jurisdiction is ill-conceived and wholly unfounded.

This section of our brief should have been unnecessary. The FPC, unable to point to a single phase of East Ohio's activities that requires any federal regulation, unable to designate an evil that Congress sought to remedy, nevertheless devotes eleven pages of its brief (pp. 20-31) to a charge that Congress was aiming the Natural Gas Act at East Ohio "in particular."

The charge is sought to be sustained by trivia based on some references to the case of *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465 (1931), in a brief filed on the constitutionality of the Natural Gas Act, upon statements selected from the extensive hearings upon the various bills[14] that preceded the Natural Gas Act and upon the claim that the Federal Trade Commission in its final report

[14] H.R. 5423, 74th Cong., 1st sess., and H. R. 11662, 74th Cong., 2d sess. were predecessor bills. H.R. 4008, 75th Cong., 1st sess. was the last bill considered in Committee. It was reported out as H.R. 6586 and accompanied by House Report 709, 75th Cong., 1st sess. Three hearings were held: Hearings on H.R. 5423, 74th Cong., 1st sess.; Hearings on H.R. 11662, 74th Cong., 2d sess.; and Hearings on H.R. 4008, 75th Cong., 1st sess.

on the natural gas industry considered East Ohio a "typical natural-gas transmission company."

The FPC overlooks the holding in *East Ohio Gas Company v. Tax Commission*[15] in favor of a dictum. What this Court held was that East Ohio's business was of such a local nature that the State of Ohio could impose a direct burden upon all of that business by levying an excise tax based on its *entire* gross receipts. East Ohio's gross receipts then, as now, came solely from sales to Ohio consumers and resulted from the operation of its connecting lines and its other properties as a whole. It had and has no other receipts and no other business.

What this Court said in the opinion as to the transmission of gas in interstate commerce was said of transmission from one State to another where a change of title occurred at the State line as in the case of Hope's sale to East Ohio. This continuous movement was referred to as essentially national in character. The cases cited in support of it were the familiar cases: the *Landon*[16] case, the *Kansas Gas*[17] case, the *Peoples Gas*[18] case and the *Attleboro*[19] case. All

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[15] In *Connecticut Light & Power Company v. Federal Power Commission*, 324 U. S. 515 (1945), Mr. Justice Jackson distinguished *East Ohio Gas Company v. Tax Commission* in large part from the problem presently presented when he said:

> "But a holding that distributing gas at low pressure to consumers is a local business is not a holding that the process of reducing it from high to low pressure is not also part of such local business. In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, the Commission has misread the decisions of this Court. No such rule of law has been laid down." (324 U. S. 534.)

[16] *Public Utilities Commission v. Landon*, 249 U. S. 236 (1919).

[17] *Missouri v. Kansas Gas Company*, 265 U. S. 298 (1924).

[18] *People's Natural Gas Company v. Public Service Commission*, 270 U. S. 550 (1926).

[19] *Public Utilities Commission v. Attleboro Steam and Electric Company*, 273 U. S. 83 (1927).

these were cases in which the particular business to be regulated clearly affected the people of more than one State.

This Court was not then considering separately for any purpose the transmission of gas by East Ohio through its lines connecting with Hope. It had no occasion to consider or apply the *Cooley* formula to that part of East Ohio's operations. In so far as the price of gas at the burner tips included the cost of that operation, this Court permitted it to be taxed by the State of Ohio as the receipts of purely intrastate business.[20]

The case was cited a number of times in a brief prepared by Mr. DeVane, Solicitor for the FPC, on the constitutionality of H. R. 11662. The brief is replete with citations of practically all the cases from this Court which had considered in any way the natural gas industry. *East Ohio v. Tax Commission* was simply one of these cases.[21]

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[20] Professor Powell interprets *East Ohio v. Tax Commission* as follows:

> "Following earlier cases Mr. Justice Butler declared this furnishing of gas at wholesale to the distributor to be interstate commerce, but he also not only declared but held that such furnishing was the end of interstate commerce. He expressly disapproved the analysis of Mr. Justice Day in the *Pennsylvania Gas* case in so far as it kept the interstate commerce unbroken until the gas was lit." [Footnotes omitted.] Powell, Note, *Physics and Law—Commerce in Gas and Electricity*, 58 HARV. L. REV. 1072, 1081 (1945).

[21] The manner in which the citations of the *East Ohio v. Tax Commission* case appear demonstrates quite clearly that the FPC's contention is unfounded. The FPC (Brief, p. 25) refers to four points at which the case was cited: (1) For the proposition that interstate transportation of gas is interstate commerce five cases were cited. One was the *East Ohio* case. (Hearings on H.R. 11662, p. 13); (2) For the proposition that Congress may regulate interstate commerce seven cases were cited. One was the *East Ohio* case. (*Id.* p. 14); (3) Mr. De Vane's brief stated the facts of the seven cases supporting the proposition that Congress may regulate interstate commerce. (*Id.* p. 16); (4) For the proposition that the decisions had distinguished the transportation of natural gas in high pressure and low pressure mains six cases were cited. One was the *East Ohio* case, and no special comment was devoted to it. (*Id.* p. 17.)

Nor do the incidental references to this case by Mr. Benton in hearings on H. R. 5423 indicate any Congressional intent to regulate East Ohio "in particular." Mr. Benton was Solicitor of the National Association of Railroad and Utilities Commissioners. Their attitude and his attitude both as to the limited problem involved and as to the necessity for not encroaching upon State power was fully expressed in the resolution adopted by the NARUC and presented at committee hearings. That resolution said:

> "Whereas the business of the transmission and sale of gas in interstate commerce at wholesale for resale, under decisions of the Supreme Court of the United States, is not subject to regulation by the States and in the absence of Federal legislation providing therefor, is left wholly unregulated; and
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> "Whereas jurisdiction to regulate such business should be vested in some tribunal, so that gas supplied to distributing companies in interstate commerce may be obtained at just and reasonable prices; therefore be it
>
> "*Resolved*, That this association favors the enactment by Congress of legislation vesting jurisdiction in some one of the existing Federal regulatory commissions to regulate *the service of supplying gas, whether artificial or natural, produced in one State and sold at wholesale to a distributing company in another State, including rates applicable to such service*; and
>
> "*Resolved further, That Congress be asked to limit the jurisdiction granted strictly to gas transmitted and sold at wholesale for resale, and that such legislation be so drawn as in no way to limit or impair the power of the States to regulate intrastate and local service, and the rates applicable thereto*; * * *" (Hearings on H. R. 11662, p. 85; Hearings on H. R. 4008, p. 22) (Italics ours).

Thus Mr. Benton's State clients urged federal regulation on account of a single feature of the long-distance pipe

line business, namely, the inability of States to regulate interstate wholesale service. But these State commissioners were likewise conscious of the manner in which federal power feeds upon itself. They therefore asked Congress specifically to draft the legislation so as to limit federal regulation to the single problem involved and thus to give the FPC no excuse for encroaching upon the power of the States. How necessary this latter precaution was is well illustrated in this case.

There is no necessity for picking sentences here and there from their context in these voluminous proceedings to know precisely where Mr. Benton and his client stood at all times.[22]

The most important evidence as to whether East Ohio "in particular" was intended to be regulated, the FPC brief does not mention. Three men, residents of Cleveland and each thoroughly familiar with East Ohio's operations, participated in the proceedings prior to and at the passage of the Natural Gas Act. They were Mr. Justice Burton, then mayor of Cleveland—Cleveland was at that time engaged in a rate controversy with East Ohio—William C. Reed, Chairman of the Public Utilities Committee of the

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[22] The FPC states (Brief, pp. 28-29) that the amendment to Section 301(b) of H.R. 5423, which was recommended by Mr. Benton, would seem "to exclude companies such as East Ohio" but "was not adopted." The bill then under consideration was before the 74th Congress. It defined jurisdiction on the basis of facilities and in such a way as to be susceptible of a construction that it included some distribution business. Mr. Benton proposed an amendment, which clearly would have excluded from FPC jurisdiction such a company as East Ohio (Hearings on H.R. 5423, p. 1668). The bill finally enacted stated jurisdiction on the basis of the business done by the companies and not merely on the facilities operated, with the result that the amendment Mr. Benton suggested was no longer believed necessary. His attitude throughout was perfectly consistent with the NARUC resolution above quoted and if he had believed that the Natural Gas Act in final form was susceptible of a construction to include such companies as East Ohio he would have renewed his amendment.

Cleveland City Council, and Robert J. Bulkley, then United States Senator from Ohio.

Any fair reading of the statements made by these men either before Committee or in the debates in the Senate, discloses that all of them either expressed or assumed that the power of the State of Ohio was fully adequate for the regulation of East Ohio. They urged the passage of the Natural Gas Act in order that the Hope Company might be subject to FPC jurisdiction and its rates to East Ohio fixed.[23]

Finally, it is true that the Federal Trade Commission in its final report made a report on East Ohio as it did on many other companies. However, the significant thing about that report is not the misleading heading under which the report was made, to which FPC calls attention (Brief, p. 30), but the following statement referring specifically to East Ohio:

> "All its operations are under the supervision and regulation of the Ohio Public Utilities Commission in addition to the important rights of the cities to negotiate rate franchise agreements directly with the utility." (Sen. Doc. 92, 70th Cong., 1st Sess., Part 84A, p. 560.)

Thus the Federal Trade Commission's report which the FPC says "disclosed the necessity for the regulation [of East Ohio] provided by the Act" (Brief, p. 30) found no gap in the regulation of East Ohio.

The plain fact is that East Ohio presented no regulatory problem either to the State of Ohio or to the federal government. State commissions had ample power through jurisdiction over the local companies to regulate their activities back to the purchase from the pipe line company. It was at that point that their power failed, and this was

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[23] Burton: Hearings on H.R. 4008, pp. 48-52; Reed: *Id.* pp. 87-95; and Bulkley: 81 Cong. Rec. p. 9315.

the gap in regulation mentioned in all the extensive hearings.[24]

But the history of this legislation will be searched in vain for any statement that a regulatory gap or a problem existed in connection with the local companies or their movement of gas from interstate pipe lines to their local plants. In the particular case of East Ohio, since Hope was an affiliated company, the Ohio Commission could inquire into the reasonableness of Hope's price and allow or disallow the actual price paid by East Ohio as an operating expense of East Ohio. The Ohio Commission on several occasions prior to the Natural Gas Act valued Hope's properties, determined its operating expenses, depreciation and return and found a fair price at the Ohio River to be included in East Ohio's expenses. *East Ohio Gas Company v. Public Utilities Commission of Ohio*, 133 Ohio St. 212, 12 N. E. 2d 765 (1938); *East Ohio Gas Company v. Public Utilities Commission of Ohio*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940). The Ohio Commission, of course, could not fix the Hope rate and this backhanded method of regulating Hope's rates was expensive and unsatisfactory. It was for these reasons and these alone that the representatives of the City of Cleveland urged the passage of the Natural Gas Act upon Congress. None of them suggested any problem as to East Ohio.

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[24] Of course there was also an obvious gap in the regulation of rates for the interstate transportation of gas—another form of interstate wholesale service. As Representative Halleck pointed out on the floor of the House, the Act was designed to fill this gap as well. 81 Cong. Rec. 6723 (1937). East Ohio had and has no transportation rates.

B. THE NATURAL GAS ACT DOES NOT INCLUDE EAST OHIO WITHIN THE AFFIRMATIVE GRANT OF JURISDICTION TO THE FPC AND SECTION 1(b) SPECIFICALLY EXCLUDES IT FROM THAT JURISDICTION.

1. East Ohio is not engaged in "transportation" within the affirmative grant of jurisdiction to the FPC and such transmission of gas as it does is excluded under the terms of Section 1(b) of the Natural Gas Act as "other transportation."

For convenience we reprint Sections 1(a) and (b) of the Natural Gas Act which "determines the Act's coverage." [25]

> "Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the *business* of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution* or to the production or gathering of natural gas." (Italics ours.)

When consideration is given to all that the FPC has said in its opinions, orders and briefs, it is clear that its

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[25] *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U. S. 507, 516 (1947).

claim to jurisdiction here is bottomed solely on the mere mechanical continuance of an interstate movement of natural gas in East Ohio's lines. This it claims is "the transportation of natural gas in interstate commerce" and within the affirmative grant of power. The exclusion of "other transportation" in Section 1(b) it assumes means only "transportation in intrastate commerce" (Brief, p. 54).

Thus the FPC conceives that Congress enacted this legislation for the purpose of regulating any transportation of natural gas in interstate commerce—and to the very end of that mechanical movement. It argues from other sections of the Act, as will be shown later, that certain provisions of the Natural Gas Act are designed solely to regulate transportation. It makes no distinction as to whether that transportation is purely private in nature as, for example, a farmer transporting gas from his own well on one side of a state line to his house on another, or an industrial user operating his own stub line from his plant to an interstate pipe line, or, as in this case, a local distributing company procuring a supply of interstate gas from a pipe line company.

In effect it says that in all of these situations there is a "person engaged in the transportation of natural gas in interstate commerce" in a literal sense and therefore in a jurisdictional sense. Although this Court held in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra*, that an interstate pipe line's sale of gas to an industrial user was not subject to FPC regulation, the present position of the FPC would require it to be held that such industrial user, in transporting that gas through its own stub line to its own plant for consumption, is a "natural-gas company" subject to FPC jurisdiction.

Such is the purely mechanical test of jurisdiction urged upon this Court. It is the means by which the FPC hopes

to obtain jurisdiction over every local distributing company in the United States which continues an interstate movement for any distance through a connecting line.

We say this advisedly. The identical mechanical argument advanced here is being advanced by the FPC's Staff Counsel to support the claim that the FPC has jurisdiction over the three large manufactured gas distributing companies in New York City which propose to buy natural gas from an interstate pipe line company for mixing purposes (FPC Docket Nos. G-1167, G-1171, G-1120). Here a proposed connecting high pressure line will be 23 miles long and all within the corporate limits of the City of New York. The brief filed by the FPC's legal staff in this case rested entirely upon the FPC's decision in the present *East Ohio* case and the arguments and citations urged upon this Court. Thus this East Ohio situation is being exploited by the FPC as the means by which it expects to obtain jurisdiction over the mixed gas distributing companies in Greater New York and over a large part of the natural gas distribution industry.[26]

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[26] The FPC's reply brief, p. 7, stated:

"The broad regulatory powers reposed in the New York Commission and its present ability to regulate the Applicants under such powers, as to the local operations of the New York Applicants, has not been and is not questioned. It is not an issue in this proceeding. The issue here presented is whether by reason of the construction and operation of the proposed facilities, the Applicants will thereby become engaged in the transportation of natural gas in interstate commerce. We have hereinbefore shown that they will be so engaged in interstate commerce. Therefore, the jurisdiction of this Commission attaches to the construction and operation of the proposed facilities to the exclusion of the jurisdiction of the State Commission."

In the conclusion of this brief it was further stated that "the New York Applicants will become natural-gas companies within the meaning of the Natural Gas Act upon completion of construction and commencement of operation of the proposed facilities and such construction and operation are subject to the requirements of Section 7 of the Natural Gas Act."

That such a purely mechanical test is not determinative of the construction of the Natural Gas Act and similar Acts this Court has held.[27]

In making these arguments to extend its jurisdiction the FPC, we suggest, overlooks two most obvious facts: (1) that the Act is a public utility regulatory Act of narrow scope, and (2) that Congress purposely and for good reason did not make the test of jurisdiction the mechanical movement of gas in interstate commerce.

As to the first of these, the purpose of the Act was not to regulate transportation or to regulate gas. Its purpose was to regulate only certain public utility aspects of the natural gas business as its provisions plainly show.

The heart and soul of every regulatory Act of this kind is the power conferred over rates and service. When we turn to Sections 4 and 5 of the Act we find that the only rates and service over which the FPC is given jurisdiction are rates to be charged either (1) in connection with transportation of natural gas in interstate commerce, or (2) rates for the sale of natural gas in interstate commerce for resale. It is given authority to fix or regulate no other rates or service. The other powers con-

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[27] *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942), p. 509: "In determining the scope of the federal power over the proposed extension of facilities and sale of gas, it is unnecessary to scrutinize with meticulous care the physical characteristics of appellant's business, in order to ascertain whether, as the court below held, the interstate commerce involved in bringing the gas into the state ends before delivery to distributors."

Connecticut Light & Power Co. v. Federal Power Commission, 324 U. S. 515 (1945), p. 531:

"The expression 'facilities used in local distribution' is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case *in addition to the technological transmission test*." (Italics ours.)

ferred by the Act are aids for carrying out these important regulatory powers. They are provisions relating to accounting, depreciation, extensions and other matters necessary for the effective regulation of rates and service. In fact the Act has its substantial counterpart in the public utility Acts of many States and other similar Acts of Congress.

It was this character of the Act that enabled the House and Senate Committees in their reports on the purpose of the bill (H.R. 6586), subsequently passed as the Natural Gas Act, to declare:

> "The bill provides for regulation along recognized and more or less standardized lines. There is nothing novel in its provisions, and it is believed that no constitutional question is presented."[28]

It follows that the transportation in interstate commerce that gives jurisdiction to the FPC must be transportation involving interstate public utility obligations. In the case of East Ohio admittedly there are none. East Ohio has neither a rate nor a service that the FPC is authorized by this Act to regulate. It makes no sales in interstate commerce to anyone. It performs no interstate transportation service for anyone. It has undertaken no interstate public utility obligation of any kind in respect of sales, transportation or other service.

If this were the East Ohio Steel Company with steel plants in Cleveland, Akron and Youngstown, and if it purchased its gas from Hope and Panhandle Eastern and transported it to its steel plants precisely as it does, no one would seriously assert it to be a "natural-gas company" as defined in the Act. It would have no public utility obligations of any kind either intrastate or interstate. Even the Hope rate to it at the Ohio River and the Panhandle rate at Maumee would not be subject to FPC jurisdiction (*Pan-*

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[28] House Report No. 709, 75th Cong., 1st sess., p. 3. The Senate Report was identical.

handle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra).

When we return to the facts of this case the only thing of a public utility nature added to the situation is local gas distribution in place of the manufacture of steel. This involves solely local public utility obligations properly regulated by the State.

In a regulatory sense as used in the Natural Gas Act East Ohio's activity in carrying purchased gas in the State of Ohio from points of purchase to its distribution centers, is not "transportation."

Coming then to the second thing that the FPC argument overlooks, namely, that Congress did not make the test of jurisdiction depend on an interstate movement of gas:

It is the peculiar nature of the natural gas business that where gas is produced in one State and transported and sold in other States there is a continuous movement of that gas from producing wells to consumers' burner tips, no matter how far distant. True, pressure is raised and lowered and the movement is more accelerated in winter than in summer. Nevertheless, it is a continuous movement that ignores State lines, sizes of pipe, amount of pressure, the ownership of the pipe through which it is passing, the classification of that pipe on the owners' books and other matters. All that Mr. Justice Jackson said of this same characteristic of the electric industry in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 529-530 (1945), is applicable to the natural gas business.

In this situation for Congress to attempt to determine for jurisdictional purposes at what point the movement in interstate commerce begins and at what point it ends as a matter of mechanics, would have been a hopelessly impossible task. This Court found no difficulty in *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465 (1931), in

holding that the interstate movement ended at some point before it reached consumers' burner tips, but it made no attempt to say at exactly what point. Moreover on the technology of the industry it would have had the greatest difficulty in doing so. High pressure lines of large size exist in every purely local distribution system and the reduction in pressure is gradual and at many points.

Those who drafted the Natural Gas Act must have been aware of the impossible problem that would have been presented if jurisdiction of the FPC were attempted on the basis of where the movement in interstate commerce technically began and ended. They did know, however, from the survey of the natural gas industry made by the Federal Trade Commission that natural gas companies engaged in three kinds of business: (1) the business of production, (2) the business of the interstate pipe line companies which transport the gas from States of production to States of consumption and for the most part sell it there to local distributing companies, and (3) the business of local distribution. Moreover they knew that the gap in regulation of the industry that brought about the demand for the Natural Gas Act was associated solely with the business of the interstate wholesale pipe line company making wholesale sales for resale.

Accordingly Congress did not make the test of jurisdiction the mere mechanical movement of gas in interstate commerce. Instead it made the test the business in which the particular company sought to be regulated was engaged. In Section 1(a) of the Act it declared "that the *business of transporting and selling natural gas* for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." (Italics ours.). It is in the light of that

policy declaration that Section 1(b) and other Sections of the Act must be read.

It follows that when Section 1(b) declares that the provisions of the Act "shall apply to the transportation of natural gas in interstate commerce," it definitely means that it shall apply to the *business* of transporting natural gas in interstate commerce either for hire or for sales for resale. Only such a transportation business has interstate public utility aspects involving both rates and service that the States can not regulate. So construed the two Sections 1(a) and 1(b) are harmonious and fully effect the purpose of Congress in passing the Natural Gas Act. Moreover, this construction is consistent with the plain purpose of Congress to regulate only the interstate public utility aspects of the natural gas business.

When, therefore, we turn to the business in which East Ohio is engaged it is clearly not the business of transportation. East Ohio is no more in the business of transportation than would be a steel company transporting interstate gas through connecting lines to its plant. Such a company remains in the steel business, its transportation being merely an incident of the steel business with no public utility aspects.

This distinction between transportation of one's own property for one's own local business and the business of transportation involving public utility relations was recognized by this Court in *The Pipe Line Cases*, 234 U. S. 548 (1914). By the Hepburn Act of 1906 the Interstate Commerce Act was amended to apply "to any corporation or any *person or persons engaged in the transportation* of oil * * * by means of pipe line * * *." It will be observed that language we have italicized is precisely the language of Section 2 (6) of the Natural Gas Act defining a natural-gas company as a "person engaged in the transportation of natural gas." Among the companies ordered by the Commission to file schedules of rates was the Uncle Sam

Oil Company which procured its oil from its own wells in Oklahoma and transported it by pipe line to its own refinery in Kansas. This Court held that the Hepburn Act was not applicable to that company and, speaking through Mr. Justice Holmes, said (234 U. S., 562):

> "It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, *the transportation being merely an incident to use at the end.*" * * * (Italics ours.)

It cannot be emphasized too strongly that the question was not there, and is not here, whether the transportation was interstate. The sole question was whether there was a business in which the owner had assumed a public utility obligation of the kind which the Act sought to regulate.

This case and the principle on which it is based are sought to be distinguished by the FPC by reference to the later case of *Champlin Refining Co. v. United States*, 329 U. S. 29 (1946). In that case this Court distinguished the *Uncle Sam Oil Company* case, saying at page 34:

> "While Champlin technically is transporting its own oil, manufacturing processes having been completed, the oil is not being moved for Champlin's own use. These interstate facilities are operated to put its finished products *in the market in interstate commerce* at the greatest economic advantage." (Italics ours.)

Thus the sole reason for the distinction is that Champlin's finished products were being transported to an *interstate* market, whereas in East Ohio's case the gas is being transported to a purely *intrastate* market. The very ground of distinction stated in the *Champlin* case fully supports the reasoning that transportation conducted solely for the purpose of supplying a local and intrastate market

is not transportation in any national regulatory sense within the meaning of the Natural Gas Act.

In *United States v. Northwestern Ohio Natural Gas Company*, 141 Fed. 198 (D. Ct., N. D. Ohio 1905), the court held a company transporting its own gas from producing fields to distribution plants not to be a company subject to a tax as "owning or controlling any pipe line for transporting oil or other products." The opinion said (141 Fed., 201):

> "To thus transport the gas by means of pipes does not constitute the company a transporting company, *nor is it thereby engaged in the business of transporting oil or gas by means of pipe lines. Such transportation is, in the most definite sense, merely incidental.* It is not, in any respect, to be distinguished from the business of transporting gas in which a manufactured gas company is engaged; such company having a plant within the limits of a city, and conducting gas which it thus manufactures through the streets of the city to the places where its customers consume it. I think it would be an absolute denial of justice to come to any other conclusion." (Italics ours.)

It seems clear, therefore, that East Ohio cannot be held to be either in the *business* of transporting interstate gas or in the *business* of making interstate sales of gas, but that such transportation as it does is, as Mr. Justice Holmes said, "merely an incident to the use at the end," which end is the *business* of local distribution and sale in purely intrastate commerce fully subject to State regulation.

As this Court said in *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 309 (1924):

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and *this is so whether the local distribution be made by the transporting company* or by independent distributing companies." (Italics ours.)

This construction of "transportation in interstate commerce" gives meaning to the exclusion of Section 1(b) that the Act shall not apply to "any other transportation," thus expressly excluding from Commission jurisdiction all transportation in interstate commerce for private purposes, transportation which has no interstate utility aspects.

The only meaning that the FPC has ever given to the exclusion of "any other transportation" is that it excludes from FPC jurisdiction purely intrastate transportation, a subject over which Congress has no direct control. (FPC Brief, p. 54.) In other words, the claim is that this exclusion is solely of denied power.

However, in declaring that the Act "shall not apply to any *other transportation or sale* of natural gas" it is clear that "other sale" means "other sales in interstate commerce" save only sales for resale. In *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra,* it was squarely held that the sale of gas there excluded from FPC jurisdiction by this language was a sale in interstate commerce, a matter over which Congress might have conferred jurisdiction upon the FPC but did not.

When therefore Congress provided in the same sentence that the Natural Gas Act should not apply to any "other transportation or sale" it is clear that Congress meant not merely to exclude intrastate transportation, as the FPC claims, but any transportation in interstate commerce of a character which had no interstate public utility aspects or which the States had the power to regulate.

Upon any realistic, practical construction of the language of the Natural Gas Act such interstate movement of natural gas as continues in the lines of East Ohio and other distributing companies similarly situated is not "transportation" intended to be regulated by the Natural Gas Act but is "other transportation" excluded by the Act.

2. East Ohio is specifically excluded from FPC jurisdiction since its sole business is "local distribution" and all its facilities are "used for such distribution."

The court below found that East Ohio "is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high pressure lines, is devoted to that sole purpose." (R. 202) (Italics are those of the court.)

If the FPC had not had the mistaken notion that its jurisdiction depended solely on the mechanical continuance of a movement of gas in interstate commerce, it would have been compelled on the record to make a similar finding. There is not the slightest evidence in this record at any point that East Ohio has any business other than local distribution, or any utility obligations other than those arising out of local distribution, or any facilities used for any other purpose.

In making the above finding excluding FPC jurisdiction, the court below did no more than give effect to the predominant characteristic of East Ohio's over-all operations, including its pipe lines, as those of a local and intrastate service.

Substitute natural gas for electricity, other figures and places for those used and the following statement of Mr. Justice Jackson in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 521-522 (1945), is here applicable:

> "It is not denied, although the Commission's findings and opinion make no mention of the fact and appear to have given it no weight, that the predominant characteristic of the company's overall operation is that of a local and intrastate service. It serves one hundred seven towns, cities, and boroughs of Connecticut with a total population of about 660,000 and in addition supplies substantially all the power used by local companies which serve communities of Connecticut having a population of 130,000. It owns no lines crossing the Connecticut boundary and does not con-

nect with any other company at the boundary. It has no business other than Connecticut service for which it needs any facilities whatever, and if local distribution service were terminated, no remaining purpose or use of any kind is suggested for the facilities in question. Its purchases and sales, its receipts and deliveries of power, are all within the state. Its rates and its fiscal and accounting affairs are fully and so far as appears effectively regulated by the State of Connecticut."

As previously pointed out many local distribution companies find it necessary to construct high pressure transmission lines to the interstate pipe lines supplying them and thus continue an interstate movement for a greater or less distance. Under such circumstances any realistic interpretation of the Natural Gas Act must recognize that the transportation through these stub lines is merely an incident of the company's sole business of local distribution. Facilities used for this transmission are in every real and practical sense facilities used for that local business. They serve no other purpose.

It is no answer to this to say, as does the FPC (Brief, p. 54), that all facilities used in the production and transmission of natural gas have for their ultimate object supplying gas to domestic, commercial and industrial customers and that application of any theory of end use would oust the FPC from all jurisdiction. Panhandle Eastern and other pipe line companies move their gas from the Southwest into Ohio and other States to carry on their business which is sales to distributing companies for resale. The business at the end is sales for resale in interstate commerce. The facilities used by them are facilities used for sales for resale in interstate commerce. In other words, the end use of their facilities is sales clearly subject to FPC jurisdiction.

On the other hand, the end use of the local distributing company is sales in intrastate commerce. The facilities

used merely to move gas to the local plants from the interstate pipe line are in every real and proper sense purely incidental to local business.

This practical concept was recognized in *East Ohio v. Tax Commission* where this Court held that the *entire* gross receipts of East Ohio's business were subject to an excise tax levied by the State of Ohio. These receipts were in part the result of the operation of the connecting facilities here under consideration and included whatever compensation East Ohio received for the use of these facilities. Nevertheless this Court held all gross receipts to be receipts from an intrastate business and subject to tax. We suggest the practical situation now under consideration is the same as it was then, and that East Ohio's entire pipe line system is a unified system used solely for local distribution.

The very fact that Congress was careful to stop FPC jurisdiction as to sales in interstate commerce at the wholesale point clearly evidences its intention to exempt from FPC regulation not merely local distribution plants but any facilities incidentally used to carry out local utility obligations even though those facilities happen to carry some interstate gas.

Either that is true or a very large section of the purely local distribution business in this country will be subjected to a regulation that Congress never intended.

3. The provisions of the Natural Gas Act as a whole show its inapplicability to East Ohio and other local distributing companies.

We have previously pointed out that the most important grant of power to the FPC, namely the power to regulate rates conferred by Section 5(a), is not applicable to East Ohio. It has no rates for transportation or for sales for resale. It engages in neither of these activities.

In spite of this admitted situation and the strong inference to be drawn from it that the Act is not applicable

to East Ohio or similar companies, the FPC asserts (Brief, pp. 43-50) that the provisions of Section 5(b) and of Section 7(a), (b) and (c) indicate an intention of Congress to regulate the interstate transportation of natural gas as such, and presumably whether or not there are any interstate public utility obligations assumed in connection with that transportation. These specific sections it claims were intended to regulate such companies as East Ohio and to permit the FPC to determine East Ohio's costs of production and transportation, all in Ohio (even though the FPC can not fix a rate for any Ohio service); to order East Ohio to establish connections and sell natural gas to distributing companies for resale (although such companies are not presently served by East Ohio); and to decide whether East Ohio can extend or abandon its pipe lines in Ohio.

This entire argument is without any reasonable foundation. Neither Section 5(b) nor any part of Section 7 as originally enacted was intended to be an independent regulatory provision. Both of these sections limit the FPC's jurisdiction to a "natural-gas company," a term meaning companies subject to FPC jurisdiction in accordance with earlier Sections of the Act. Moreover there is nothing in the legislative history of these Sections which indicates any intention on the part of Congress to extend the meaning of "natural-gas company" beyond the scope of Section 1 of the Act, or that indicates that transportation of natural gas alone was intended to be regulated. Indeed the history of these Sections shows quite clearly they were never intended to apply to companies like East Ohio.

Section 5(b) of the Natural Gas Act, as finally passed, is as follows:

> "(b) The Commission upon its own motion or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the

> cost of the production or transportation of natural gas *by a natural-gas company* in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." (Italics ours.)

As the Act came to the floor of the House after all hearings had been held, Section 5(b) did not contain the words "by a natural-gas company," italicized above. They were inserted by what is known as the Boren amendment made on the floor of the House and accepted by the Committee on Interstate and Foreign Commerce. (See 81 Cong. Rec., p. 6728.)

It will be observed that without the italicized words the paragraph gave the FPC a roving commission to make such investigations without any certainty as to what, if any, limitations were intended. Mr. Boren had from the beginning been concerned with this investigatory power of the Commission and had interrogated several witnesses concerning the necessity for it. Mayor Burton had told him that it might be useful in Ohio for ascertaining all the facts as to the Hope Company in West Virginia. Mayor Burton made no suggestion that it would be useful as to East Ohio for he said the Ohio Commission was "getting all the facts in Ohio" (Hearings on H.R. 4008, pp. 49-50).

Later Mr. Maltbie of the New York Commission was asked by Mr. Boren about the necessity for Section 5(b). Mr. Maltbie said that if the FPC would regulate the price at which the gas was sold to the local distributing company "we do the rest, taking it down to the consumer.

> "That leaves the Federal Power Commission in its own field to act as it may be authorized. It leaves the State Commission in its own field to act as it may be authorized." (Hearings on H.R. 4008, pp. 112-113.)

Thus convinced that FPC investigatory power should be confined Mr. Boren offered his amendment and said:

"This amendment clarifies the jurisdiction as between Federal and State Governments, and assures us that the Federal Government will not go into a realm where a State government already has proper authority to handle the problem." (81 Cong. Rec., p. 6728.)

Thus the declared purpose of the author of the amendment, as well as its language, shows that it was not intended to extend FPC jurisdiction to companies not otherwise within its jurisdiction as "natural-gas companies." It further shows that Section 5(b) was merely intended to give the FPC investigatory powers, to assist State commissions on requests, in cases where having jurisdiction over a "natural-gas company" such an investigation and determination of costs might be useful in the regulation of rates still subject to State jurisdiction.

This still leaves a very useful function for the FPC under 5(b). As this Court has held, the Act leaves the regulation of industrial and other local consumer rates by pipe line companies to the States. It may well happen that in the regulation of industrial rates, for example, as in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra,* it will be necessary for the State Commission to ask the FPC to investigate the cost of production and transportation of the pipe line company outside the State regulating the rate. Under such circumstances Section 5(b) authorizes the FPC to make any necessary investigation or determination to assist the State Commission in fixing such local industrial rates.

Certainly the history of this section and the purpose and form of this amendment do not in the least indicate any intention of Congress to expand the meaning of "natural-gas company" beyond the definition made in the early Sections of the Act.

Moreover, it completely denies the FPC argument that Mr. Boren not only failed to limit Section 5(b) by his amendment but that he unwittingly broadened the scope of the entire Act.

Nor do the various paragraphs of Section 7 of the Act support the FPC's theory that it is an independent regulatory provision. Paragraph (a) is a perfectly usual regulatory provision, having its counterpart in many public utility acts. It authorizes the Commission to direct a "natural gas company" to extend or improve facilities and "to establish physical connections of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public."

This language has obvious applicability to interstate pipe line companies most, if not all, of which are already in the business of wholesaling gas to local distributing companies. It is equally obvious that it can be applicable to few, if any, of the local distributing companies which transport supplies purchased from interstate pipe lines to their local plants.

Moreover any attempt to make it applicable to such a local distributing company as East Ohio presents a serious question of the constitutionality of the Section.

The record is clear that East Ohio does not now and never has held itself out as willing to transport and sell natural gas, either in interstate commerce or otherwise, to any local distributing companies for resale. No part of its property has ever been devoted to that wholesale utility service.

Time and again this Court has held that a company cannot, consistently with due process, be required to undertake a business in which it has never voluntarily engaged. As this Court said in *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595 (1915):

> "If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight."

In *Interstate Commerce Commission v. Oregon-Washington R. R. and Navigation Co.*, 288 U. S. 14 (1933), this Court

to avoid unconstitutionality interpreted the Interstate Commerce Act as not requiring a similar extension of public utility service; so should the Natural Gas Act be construed here.

In two recent cases it has been held that corporations transporting gas from their own fields in one State through their own transmission lines for purposes of distribution by them to the public in another State cannot be required to carry gas for other persons. *Texoma Natural Gas Company v. Railroad Commission of Texas*, 59 F. 2d 750 (D. Ct. W. D. Tex. 1932); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937). See also *Louisville and Nashville Railroad Company v. West Coast Naval Stores Company*, 198 U. S. 483 (1905), *Weems Steamboat Company v. People's Steamboat Company*, 214 U. S. 345 (1909), *The Pipe Line Cases*, 234 U. S. 548 (1913).

Thus not only is it apparent that Section 7(a) does not expand in the least the meaning of "natural-gas company" but that if it is applied to a company situated like East Ohio it is unconstitutional.

We observe that the FPC brief claims (p. 61) that *Federal Power Commission v. Natural Pipe Line Co.*, 315 U. S. 575 (1942), puts this constitutional question to rest. The fact is that all this Court considered and decided in that case was that federal regulation of interstate wholesale rates was constitutional.

Section 7(b) forbids a "natural-gas company" to abandon any facilities "subject to the jurisdiction of the Commission, or any service rendered by means of such facilities" without the approval of the Commission. The only "service rendered" by East Ohio by means of any of its facilities is local distribution under local franchises. Surely Congress did not intend East Ohio to submit to the FPC the question of whether it could abandon a transmission pipe line running, for example, from Gross Farm Station to Youngstown, or other community. The State

of Ohio already by Ohio General Code Sections 504-2 and 504-3 has imposed on East Ohio the necessity of obtaining its consent before abandoning any facilities or service rendered thereby. Must both the Ohio Commission and the FPC consent? And what is to happen if they do not agree?

Section 7(b) read as applicable to an interstate pipe line company transporting gas from producing fields in one State and selling gas to distributing companies and industries in other States makes complete sense. Read as applicable to East Ohio and similar local distributing companies it provides no regulation not already fully imposed by the power of the States. Certainly it adds nothing to the definition of a "natural-gas company" to which its applicability is limited.

Likewise Section 7(c) in its original form if read with an interstate pipe line system in mind makes complete sense and effective regulation, but read with East Ohio in mind is an obvious intrusion upon State power. It provided that "no natural-gas company" shall extend its facilities "for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company," or extend facilities or sell in any such market, without obtaining a certificate of convenience and necessity from the FPC. The intended application of this Section and indeed of the whole Act is shown by the last sentence, which in part declares:

> "* * * *it being the intention of Congress that natural gas shall be sold in interstate commerce for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (Italics ours.)

Certainly that declaration of intention as to natural gas sold for resale for ultimate public consumption is in no sense applicable to East Ohio but is perfectly applicable to the great interstate pipe line companies.

As a matter of fact Mr. Lea, Chairman of the House Committee on Interstate and Foreign Commerce, assumed complete responsibility for Section 7(c), explaining that since the "natural-gas companies" were being brought under regulation it was only fair that they should be given the protection of this Section against competition. He said that he regarded regulation as "monopoly controlled in the public interest" (Hearings on H. R. 4008, pp. 81-83).

In accordance with Mr. Lea's views Section 7(c) as initially enacted provided for a certificate of public convenience and necessity only when one "natural-gas company" proposed to invade a market already served by another "natural-gas company." The Section as originally enacted simply protected the newly regulated "natural-gas companies" against competitors.

Later, in 1942, Section 7(c) was amended (56 Stat. 83) to extend greatly the power of the FPC in this field. However, the definition of "natural-gas company" has never been changed and we must look to the Act in its original form for assistance in determining its meaning. Original Section 7 and its history give no help to the claims of the FPC for power over East Ohio and the other local distributing companies throughout the country.

A construction of the Natural Gas Act which denies the FPC jurisdiction over East Ohio is not merely in complete conformity with the express language of the Act but fully accomplishes every purpose Congress had in mind in its passage. It fills the gap in the regulation of the industry that was the occasion of the Act. Henceforth no public utility obligation of any kind in connection with the natural gas industry will go unregulated. The States will continue to regulate, as they have effectively done for many decades, all the activities of such companies as East Ohio. The pipe lines which the States are unable to regulate will be the exclusive province of the FPC. Dual regulation will be avoided.

Affirming the judgment below will merely deny a bold attempt of the FPC to extend its jurisdiction far beyond the language of the Act and the intention of Congress.

II. THE BURDEN ON EAST OHIO AND ON OHIO CITIZENS OF COMPLIANCE WITH THE FEDERAL POWER COMMISSION ORDERS HERE UNDER CONSIDERATION, CONSIDERED IN THE LIGHT OF THEIR END RESULT, IS SO GREAT AS TO MAKE SUCH ORDERS TRANSGRESS STATUTORY AND FEDERAL CONSTITUTIONAL LIMITS.

As to the federal constitutional questions which East Ohio has pressed upon the FPC since the beginning of the jurisdictional issue, the FPC said in Opinion No. 37 (*In the Matter of The East Ohio Gas Co.*, 1 F. P. C. 586, 592 (1939)):

> "It is not within the Commission's province to pass upon the constitutionality of statutes enacted by Congress."

In its Opinion No. 158 the FPC ignored these questions except for stating on the matter of taking property for public use without just compensation (R. 179):

> "As to cost of compliance, that alone is no bar."

A. THE FEDERAL POWER COMMISSION'S GENERAL POWERS UNDER THE NATURAL GAS ACT MUST BE EXERCISED REASONABLY TO SERVE THE OBJECTIVES OF ITS REGULATION AND THE ORDERS HERE INVOLVED GO BEYOND THAT LINE OF REASONABLENESS.

If by Section 1 of the Natural Gas Act East Ohio is not subject to FPC jurisdiction then of course nothing that is said in the later Sections of the Act can be used to support the FPC orders here involved (*supra*, p. 12). Let us assume, however, that the FPC's mechanical theory

is correct and that technically East Ohio is a "natural-gas company" under the Act. Does it follow, as the FPC brief claims (pp. 63-80), that any order the FPC gives East Ohio is valid under the Natural Gas Act and the federal constitution? That is a claim for *absolute* administrative finality.

The brunt of the FPC argument, based on its italicized version of the statute, is that under Sections 6(b), 8(a) and 10(a) "every natural-gas company" must file inventories, keep prescribed accounts, make reports and so forth. The FPC does not point out that under Section 6(b) the obligation upon the companies is "upon request" by the FPC, and it does not italicize the provisions in Sections 8(a) and 10(a) that the special accounting and reports prescribed by the FPC must be "necessary or appropriate for purposes of the administration of this act." Indeed Section 16 places this limitation upon the power of the Commission with respect to all its orders, rules and regulations. In other words, what is important is not the language used in the Act as to the obligations of "natural-gas companies" but the limitations, expressed and inherent, upon the FPC's general powers.

As to the express statutory limitations it is apparent that the Commission's orders in every case must be "necessary or appropriate" to some legitimate end within its statutory power. Plainly the circumstances vary as to what is necessary or appropriate and doubtless latitude is to be accorded the FPC in such determination. But if the circumstances are such that an order is neither "necessary or appropriate" the FPC has overstepped the authority Congress gave it.

It is an amazing circumstance that, nowhere in this East Ohio proceeding has the FPC undertaken to show by evidence or otherwise that its specific 1939 orders to East Ohio or its general report and accounting orders which it

seeks to apply to East Ohio are "necessary or appropriate" either to its FPC functions or to those of any one else.

It has rested its case upon the simple theory that it has jurisdiction over East Ohio and that any specific orders it gives to East Ohio and any general orders it makes applicable to all "natural-gas companies" are, *ipso facto*, "necessary or appropriate."

It is evident that the same accounting and reports are not "necessary or appropriate" for interstate pipe lines and wholesaling companies and for local distributing companies. In the one case the FPC must fix rates; in the other it can not. It may be necessary to assist in fixing wholesale rates for the FPC's system of accounts as now prescribed to be applied to all of a wholesale company's operations. *Northwestern Electric Co. v. Federal Power Commission*, 321 U. S. 119 (1944), upon which the FPC relies (Brief, pp. 72, 75, 77-78), was, of course, such a case within the FPC's electric jurisdiction. On the other hand, when local distributing companies, such as East Ohio, own and operate only local property within one State, maintain complete accounts already prescribed by a State commission and have no rates or charges subject to FPC jurisdiction, such federal accounting uniformity is patently unnecessary. Indeed we suggest that Congress recognized this inherent lack of such necessity when it said in Section 1(b) of the Act that the "provisions of this act," and without any exception as to any of them, shall not apply to "production" or "gathering" or "to the local distribution of natural gas."

Perhaps in extraordinary circumstances some necessity for that federal accounting uniformity might exist, but here the FPC has introduced no evidence of any kind, has made no showing of any kind, indeed has made no claim of any kind that in fact such a necessity or appropriateness does exist.

It is also evident that a federal regulatory commission must consider the expense involved of complying with its

orders. Here, as the record shows, the FPC never did. Now before this Court it claims that the $1,500,000 to $2,000,000 which its orders here involved would cost East Ohio and Ohio gas consumers is not "unreasonable" (Brief, p. 79). It refers to *American Telephone & Telegraph Co. v. United States,* 299 U. S. 232 (1936), where the cost of compliance with federal commission accounting orders for one of the telephone companies was somewhat larger. This citation indicates the FPC's unwillingness to consider what is "necessary or appropriate." In that case there were involved enormous interstate telephone companies with enormous properties. Moreover, the federal commission in that case was charged with the duty of regulating their rates. Contrast this situation with East Ohio. It is a relatively small company operating only in Ohio and has no rates to be regulated by the FPC. The sole effect of saddling it with a $1,500,000 to $2,000,000 expense will be to cause a rate increase to its Ohio consumers. Absolute dollar amounts as to the cost of compliance can, of course, not be compared without a complete comparison.

It was developed at the hearing and consistently urged by East Ohio, the State of Ohio, and the Ohio Commission that the expense sought to be imposed by the FPC on East Ohio had no value for any local rate regulation. For example, had East Ohio complied with the FPC's 1939 order to it as to inventories, original cost and operating expenses of its lines connecting with Hope, that data, in so far as it was not a complete duplication of the data which the Ohio Commission had, would under Ohio statutes have been of no value for Ohio rate making purposes (*supra,* p. 14).

Thus we submit that under all of the circumstances the orders which the FPC here seeks to impose upon East Ohio are neither "necessary or appropriate" for purposes of the "administration" of the Natural Gas Act.

B. THE FEDERAL POWER COMMISSION'S ORDERS HERE INVOLVED, IRRESPECTIVE OF STATUTORY AUTHORITY, VIOLATE FEDERAL CONSTITUTIONAL PRECEPTS.

1. Contrary to Article I, Section 8, and the Tenth Amendment, the orders seek to regulate intrastate commerce which in no way affects interstate commerce.

The federal constitution imposes certain limitations, apart from those of the Act, upon the FPC's doctrine of absolute administrative finality. The Constitution does not permit Congress or any agency created by it to order the production of information for its own sake. It has long been settled that the federal government has no general power of investigation. At least as early as *Kilbourn v. Thompson*, 103 U. S. 168 (1880), this Court held that Congress could not constitutionally compel the production of information in connection with an inquiry into the affairs of Jay Cooke & Co., which owed substantial debts to the United States. It said (103 U. S., 190):

> "* * * we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter in which that House has jurisdiction to inquire, and we feel equally sure that *neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.*" (Italics ours.)

Of course, where the production of information is necessary and relevant to the exercise of the power of regulation, or taxation, or for the purpose of securing information upon the basis of which to legislate, the federal government has the power to investigate necessarily implied in its specifically delegated powers, e.g. *Smith v. Interstate Commerce Commission*, 245 U. S. 33 (1917) (regulation); *Flint v. Stone Tracy Company*, 220 U. S. 107 (1911) (taxation); *McGrain v. Daugherty*, 273 U. S. 135 (1927) (legislation).

But it is equally clear that Congress is not "invested with 'general' power to inquire into private affairs and

compel disclosures * * *." *McGrain v. Daugherty, supra,* at 173-174. "An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means." *Jones v. Securities & Exchange Commission,* 298 U. S. 1, 25-26 (1936).

In the present East Ohio case it is apparent that the FPC orders are either for the purpose of disclosing facts as an end in themselves, which is not permitted, or to regulate intrastate commerce. We say *regulate* intrastate commerce because provisions for the control of accounting and other requirements are in themselves a "type of regulation" (*Electric Bond & Share Company v. Securities and Exchange Commission,* 303 U. S. 419 (1938)). Here the accounting and information requested are as to their great bulk with respect to properties used solely in the intrastate production and distribution of natural gas. It is all unrelated to any regulatory function which the FPC can or even claims it can perform as to East Ohio. In other words, this is not a case like *Interstate Commerce Commission v. Goodrich Transit Company,* 224 U. S. 194 (1912), upon which the FPC relies to support its claim of complete administrative finality as to the orders here involved.

The exercise by the FPC of its general powers, if any in these premises, in aid of intrastate regulation falls beyond the federal sphere of jurisdiction delineated by Article I, Section 8, and is an invasion of the powers reserved to the States by the Tenth Amendment.

2. Contrary to the Fourth and Fifth Amendments the orders under all of the circumstances constitute unreasonable searches and seizures and a taking of property without due process of law.

The constitutional provisions which protect East Ohio against the arbitrary federal administrative action here involved are the Fourth and Fifth Amendments.

In *Federal Trade Commission vs. American Tobacco Company*, 264 U. S. 298 (1924), the Federal Trade Commission sought to exercise its general statutory power to inspect documents and correspondence. The company resisted on the ground that the inspection was a mere fishing expedition and contrary to the Fourth Amendment which prohibits unreasonable searches and seizures. This Court through Mr. Justice Holmes sustained the company's position and pointed out that the Commission's general statutory authority must be construed as limited by the Fourth Amendment and exercised so as not to violate it. Concluding his opinion he said (264 U. S., 307):

> "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408. *United States v. Jim Fuey Moy*, 241 U. S. 394, 401."

See *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937).

Even if authorized by statute, regulation involving an expense utterly disproportionate to the regulatory object to be accomplished is an unconstitutional deprivation of property.

In *Missouri Pacific Railway Company v. Nebraska*, 217 U. S. 196 (1910), this Court held that any administrative order which required a company to incur substantial expense was a taking of property. In that case a Nebraska statute required every railroad company to build a side track to any grain elevator of a certain capacity upon the written application of the operator. In the two cases before the Court the railroads had refused to comply with such written applications. Mr. Justice Holmes said (217 U. S., 205):

> "In the present cases, the initial cost is said to be $450 in one and $1732 in the other; and to require the company to incur this expense unquestionably does take

its property, whatever may be the speculations as to the ultimate return for the outlay."

State of Washington, ex rel. Oregon Railroad and Navigation Co. v. Fairchild, 224 U. S. 510 (1912), in which a State commission had ordered a track connection, recognized the settled principle that an order requiring expenditures by a public utility is not a "mere administrative regulation," but rather a "taking of property" (224 U. S. 523). Holding further that such a "taking of property" must be reasonably related to the purposes to be accomplished by the administrative order, this Court said (224 U. S., 533):

> "A careful examination of this record fails to show what, if any, business would be routed over these connections, or what saving would come to the public if they were constructed. There is nothing by which to compare the advantage to the public with the expense to the defendant and nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company. The judgment is therefore reversed without prejudice to the power of the Commission to institute new proceedings."

In the record now before this Court there is nothing indicating any reasonable necessity for the tremendous expense which would be imposed on East Ohio and ultimately upon the gas consumers of the State of Ohio. Indeed, as we have pointed out, the information sought by the FPC will be useless—both nationally and locally. An administrative order requiring an expenditure of close to $2,000,000 and achieving nothing in the public interest is, we submit, so arbitrary, unjust and unreasonable as to amount to a deprivation of property in violation of the Fifth Amendment.

Unable to find any proper interest to be served by the orders directed to East Ohio, the FPC has said simply that the estimated expense of $1,500,000 to $2,000,000 was in-

accurate. That estimate was made by East Ohio's President (R. 25), and the FPC did not even attempt cross examination on that point. The estimate is uncontradicted in the record. Yet the FPC in its final opinion stated that "our experience with other companies with greater property investment indicates that this estimate is considerably exaggerated" (R. 179).

The evidence which led the FPC to that conclusion does not appear in the record. East Ohio cannot know what it was, if any, or what similarity there may have been between the properties of East Ohio and these "other companies," or at what point in the changing price levels the expenses of the undisclosed "other companies" were incurred. Administrative decision on evidence never introduced and never subject to explanation or examination is itself a denial of procedural due process. *U. S. v. Abilene & Southern Railway*, 265 U. S. 274 (1924); *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937).

The FPC, now recognizing this inherent defect in its procedure in this case, has attempted to remedy the obvious deficiency in a footnote in its brief here (fn. 36, p. 79). A footnote in a brief before this Court is not the appropriate place to try a crucial issue of fact.

In the *American Telephone* case referred to above and cited by the FPC (Brief, pp. 71, 79-80) this Court considered whether the Federal Communications Commission could require the use of its uniform system of accounts which required a statement of original cost. It is to be observed that this Court commented on the expense involved as follows (299 U. S. 247):

> "Fourth: The evidence does not show that the expense of revising the accounts will lay so heavy a burden upon the companies as to overpass the bounds of reason."

In the present case the *evidence* shows beyond question that the expense involved in complying with the FPC orders in question is so large in relation to any legitimate purpose to be served "as to overpass the bounds of reason." Not only is the expense enormous in itself, but as we have seen, the data involved can serve no useful purpose whatsoever.

CONCLUSION.

For the reasons hereinbefore set forth we respectfully urge that the judgment of the court below be affirmed.

Respectfully submitted,

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November, 1949.

APPENDIX.

Natural Gas Act, As Amended.

[PUBLIC—No. 688—75TH CONGRESS]
[CHAPTER 556—3D SESSION]
[H. R. 6586]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

SEC. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

* * * * *

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regu-

tions affecting or pertaining to such rates or charges, all be just and reasonable, and any such rate or charge at is not just and reasonable is hereby declared to be lawful.

(b) No natural-gas company shall, with respect to any ansportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue eference or advantage to any person or subject any erson to any undue prejudice or disadvantage, or (2) aintain any unreasonable difference in rates, charges, rvice, facilities, or in any other respect, either as between calities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file ith the Commission, within such time (not less than sixty ays from the date this act takes effect) and in such form the Commission may designate, and shall keep open in nvenient form and place for public inspection, schedules owing all rates and charges for any transportation or le subject to the jurisdiction of the Commission, and the assifications, practices, and regulations affecting such tes and charges, together with all contracts which in any anner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no hange shall be made by any natural-gas company in any ch rate, charge, classification, or service, or in any rule, gulation, or contract relating thereto, except after thirty ys' notice to the Commission and to the public. Such otice shall be given by filing with the Commission and eeping open for public inspection new schedules stating ainly the change or changes to be made in the schedule or hedules then in force and the time when the change or anges will go into effect. The Commission, for good use shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an

order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such

natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its

affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

ASCERTAINMENT OF COST OF PROPERTY

SEC. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas

company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

[1] (c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extension thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for

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[1] This is paragraph (e) as originally enacted. It was then the concluding paragraph of Section 7.

certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.

(The foregoing paragraph (c) was amended and supplemented February 17, 1942 (56 Stat. 83) by substituting the following paragraph (c) and adding the following paragraphs (d), (e), (f) and (g) to Section 7):

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to

the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience, and necessity for service of an area already being served by another natural-gas company.

ACCOUNTS, RECORDS, AND MEMORANDA

SEC. 8. (a) Every natural-gas company shall make, keep and preserve for such periods, such accounts, records of cost accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this act: *Provided, however*, That nothing in this act shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commis-

sion shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all time have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

RATES OF DEPRECIATION

SEC. 9. (a) The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortiza-

tion of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

PERIODIC AND SPECIAL REPORTS

SEC. 10. (a) Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate

assist the Commission in the proper administration of is act. The Commission may prescribe the manner and orm in which such reports shall be made, and require om such natural-gas companies specific answers to all uestions upon which the Commission may need informaon. The Commission may require that such reports shall clude, among other things, full information as to assets nd liabilities, capitalization, investment and reduction ereof, gross receipts, interest due and paid, depreciation, nortization, and other reserves, cost of facilities, cost of aintenance and operation of facilities for the production, ansportation, or sale of natural gas, cost of renewal and eplacement of such facilities, transportation, delivery, use, nd sale of natural gas. The Commission may require any uch natural-gas company to make adequate provision for urrently determining such costs and other facts. Such eports shall be made under oath unless the Commission herwise specifies.

(b) It shall be unlawful for any natural-gas company illfully to hinder, delay, or obstruct the making, filing, r keeping of any information, document, report, memoandum, record, or account required to be made, filed, or ept under this act or any rule, regulation, or order thereunder.

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ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform ny and all acts, and to prescribe, issue, make, amend, and escind such orders, rules, and regulations as it may find ecessary or appropriate to carry out the provisions of is act. Among other things, such rules and regulations ay define accounting, technical, and trade terms used in is act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed ith the Commission, the information which they shall con-

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